No. 3895.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

KATE I. D'ALERIA,
Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE SHIREY, his wife,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

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FILED

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It should be noticed that plaintiff in error on page 2 of her brief states the fact that no answer was ever filed on behalf of the defendant Harold A. Adrian, or under his true name, Armand M. d'Aleria, and that no appearance was made for or on his behalf at the trial of the cause. That statement is correct, but it is also a fact that both defendants under the names of Harold M. Adrian and Kate Nixon filed a special demurrer to the plaintiff's amended complaint, which demurrer was sustained by the court. Thereafter the order sustaining this demurrer was set aside by the court and then withdrawn on the stipulation of the attorneys for both defendants, Messrs. Miller Thornton Watt & Miller. Their counsel filed an answer only for Kate I. d'Aleria.

A supplemental complaint was filed on behalf of the plaintiff's setting forth that the true name of Harold A. Adrian was Armand d'Aleria and that under his true name he married Kate I. Nixon and that their true names now are Armand d'Aleria and Kate I. d'Aleria (husband and wife) and commonly called Count and Countess d'Aleria. (Page 22, Transcript.)

All of the evidence heard by the jury in this case is not printed in the Transcript of the record, and is not before this court on this writ of error.

Plaintiff in error in her brief, commencing on page 7 to and including page 36 inclusive, devotes all of those pages as to what the evidence before the jury was, and is, upon which the jury rendered its verdict in this case. There appears in the record now before this court as hereinbefore stated only a small part of the evidence heard by the jury, upon which the jury based its verdict.

There was but one exception taken by the plaintiff in error during the trial of the cause, which appears in the Transcript of the Record on page 64 of the Transcript, and the only exception upon which plaintiff in error is entitled to be heard in this court to set aside the verdict and judgment. It is so admitted by plaintiff in error on page 37 of her brief. This error is based on the refusal of the court to give an instruction to the jury for a directed verdict.

Atlantic Ice & Coal Corporation vs. *Van,* 276 Fed. 647, Court held that

> "No exceptions were taken to charge of the court or to its rulings upon the admission or rejection of evidence; therefore the only question presented by this record is whether or not the court erred in overruling the motion of the defendant, at the close of all of the evidence, for a directed verdict." (2) "A court has no authority to direct a verdict, where a consideration of all the evidence, and the inferences reasonably and justifiably to be drawn therefrom would sustain a verdict for the opposing party. (P. 648.) If the evidence is such that reasonable minds may arrive at different conclusions, then it is the duty of the trial Court to submit the issues of fact to a jury" . . . "nevertheless the question of the credibility of witnesses is a question for a jury. If the jury believed the witnesses offered by the plaintiff, as it evidently did, then the plaintiff fully met this burden."

That is the burden of proof. The court refused the following instruction as requested by plaintiff in error. (Page 70 of Transcript.)

> "You are hereby instructed that the plaintiffs above named failed to make any showing in this case to entitle them to a judgment against the defendant Mrs. Nixon, and you are hereby directed that as to the said defendant Mrs. Nixon, you find a verdict in her favor and against the plaintiffs."

The instruction for a directed verdict was fully covered by the charge of the court as given to the jury. (Page 63 of Transcript.)

In the above requested instruction the court was requested to instruct the jury that the

> "plaintiffs above named failed to make any showing in this case to entitle them to a judgment against the defendant Mrs. Nixon, etc."

The court did not err, we contend, in refusing to give this instruction to the jury, the instruction as offered is vague and uncertain; it was for the jury to determine this fact from all of the evidence in the case, and not that "the plaintiffs failed to make any showing against the defendant Mrs. Nixon." The jury reached its verdict from all the evidence in the case, and not from the evidence solely as set forth in the Transcript filed herein.

All of the cases cited by plaintiff in error in her brief are cases which involved the question of negligence, master and servant, and the scope of the employment of the servant in relation to his master's business, and being within the scope of his employment at the time of the accident. The plaintiff in error, on page 7 of her brief (bottom of page), says:

> "That the verdict of the jury, based upon the evidence to which we have referred, receives no justification whatever in law, we respectfully submit is conclusively established by the following authorities."

The evidence referred to is not all of the evidence that was before the jury in this case, and all of the evidence in this case is not before this court in the Transcript. The facts and circumstances in this

case are entirely different from any facts or circumstances appearing in the decisions cited by plaintiff in error, and each case must stand upon its own facts and circumstances. In this case the evidence before the jury shows that the defendant Armand d'Aleria was living at the St. Francis hotel in San Francisco under the name of Harold Adrian at the time of the accident. It is alleged and admitted in the answer of plaintiff in error that she was the owner of the big Locomobile touring car at the time it collided with the Studebaker car at the time in question. (Page 20 of Transcript, Par. 3.) That Harold A. Adrian at the time of the accident was not in the employ of Kate I. Nixon as a chauffeur and was not at that time employed by her at all, but she selected him to drive her car and placed him in charge of her Locomobile touring car just before the accident, as established by the evidence, to take her car to the garage.

Donaghue vs. *Hayden et ux,* 194 Pac. 1007.

Testimony of Kate I. Nixon, Page 39, Transcript (direct):

> "Q. Had you any talk with Harold Adrian shortly prior to this accident with relation to this Locomobile; and if so, state what it was?
>
> "A. I had asked him to take it directly from the Class A Garage. . . . (Page 40, Transcript.)
>
> "Q. Now was Adrian your chauffeur?
>
> "A. He was not."

The evidence shows they had been out together the evening of the accident and returned to the St. Francis Hotel after eleven o'clock.

"Q. When you got out of the car at that time, tell the Court and jury just what you stated to him?

"A. We drove to the Powell street entrance of the St. Francis, and I said to him, 'Now, you take the car up to the garage and leave it there,' that was the whole conversation.

"Q. What was Adrian's business?

"A. He played a Wurlizer organ in different theatres.

"Q. He was a musician?

"A. He was a player of the Wurlitzer organ."

Cross-examination, Page 41, Transcript.

"Mr. Adrian's real name is Armand d'Aleria.

"Q. Where were you living at that time?

"A. I was living in Reno. At the time of this accident I was living at the St. Francis and Mr. d'Aleria was living at the St. Francis Hotel. I think I had been living there about a week. Mr. Adrian drove the car that night and once or twice before. I think he drove the car once or twice while we were in Reno. . . . I now state he has only drive the car once or twice before the accident. . . . Mr. Adrian was in my employ in Reno as a musician. . . . I owned the same Locomobile touring car all the time. (P. 42, Trs.) The car had been kept by me in the Class A Garage a week or two, something like that, a week I think it was, I do not remember exactly."

Deposition of Harold A. Adrian. (Page 47 Trs.)

"My name is Harold A. Adrian, aged twenty-two years, living at 5226½ Sunset Boulevard, and am a musician; I am one of the defendants in this case and know my co-defendant sued herein as Kate Nixon and Mrs. George Nixon. . . . About 12:30 A. M. on Sunday, April 20th, 1919, I was driving and in charge of a Locomobile automobile owned by Mrs. Nixon, at or near the intersection of Golden Gate Avenue and Gough Street, in the City and County of San Francisco, . . . she had been with me in that automobile that evening when I was driving and operating the same, and she left the automobile about twenty minutes before the accident. . . . This automobile was kept in the Post Street Garage sometimes, and at other places. . . . (P. 48, Trs.) "I don't know the exact location."

"Q. 14. State whether or not, at the time Mrs. Nixon left said automobile, she gave you any instructions with relation to the same. . . .

"A. I was instructed to take the car to the garage, but first told her I was going down Market Street to see a music publisher down there by the name of Reese, and then I was going to take the car to the garage."

The jury was instructed by the court (Page 61, Trs.) in part as follows:

"In weighing the evidence you are to consider the credibility of the witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses, their character as shown by their evidence, their manner on the stand, their relation to the parties, if any, their degree of intelligence, the reasonableness or unreasonableness

> of their statements. A witness is presumed to speak the truth; this presumption, however, may be repelled by the manner in which the witness testifies, by the character of his testimony or by testimony affecting the character of the witness for truth, honesty or integrity, or his motives, or by contradictory evidence."

No exception was taken to the charge to the jury by the plaintiff in error. The jury heard and saw the plaintiff in error on the witness stand and had the opportunity of observing her manner on the witness stand when testifying in this case. The jury were the sole judges of the credibility of the witnesses who testified in the case, and of their demeanor while on the stand. The jury heard the deposition of Harold A. Adrian read to them, and heard Mrs. Kate I. d'Aleria testify on the stand. It was for the jury to determine the degree of credence to be accorded to their testimony. The inherent improbability of their testimony may be such as to deny it all claims to be belief and may give rise to doubts as to their sincerity. The jury had the right to weigh all the evidence in the case and the jury may have believed from the evidence that the testimony of plaintiff in error and her husband, Count Armand d'Aleria, were colored, or by them not correctly stated. The jury in this case had the evidence before them that the deposition was taken in the name of Harold A. Adrian on the 7th day of February, 1921 (P. 46, Trs.), in Los Angeles, and it was also in evidence before the jury that he and Kate I. Nixon were married at San Diego, California, on the 26th day of January, 1920, and at

the time of the marriage he gave his true name as Armand d'Aleria, and after said marriage they were known as Count and Countess d'Aleria. Thus from the foregoing evidence above quoted it was for the jury to determine what credence should be given to the testimony of the plaintiff in error and her husband, Armand d'Aleria. They were husband and wife at the time the deposition was taken and had been such for more than one year at the time his deposition was taken which was read to the jury. The jury had the sole right to determine from the evidence whether he told the truth or not when he said his true name, when his deposition was taken, was Harold A. Adrian, or whether he told the truth at the time he married Kate I. Nixon that his true name was Armand d'Aleria. The credibility of these two witnesses and all other witnesses was strictly within the province of the jury. This we most respectfully submit is held to be the law by the following authorities:

Bergert vs. *Payne,* 274 Fed. 787. "The credibility of witnesses is peculiarly for the jury."

Gold Hunter Mining & Smelter Company vs. *Johnson,* 233 Fed. 849.

Hobbs vs. *Kizer,* 236 Fed. 685.

Atlantic Ice & Coal Co., 276 Fed. 647.

Donaghue vs. *Hayden et ux,* 208 Pac. 1007.

It appears from the testimony heretofore quoted that Harold Adrian at the time of the accident was

not employed by the plaintiff in error as her chauffeur. That she was not conducting or carrying on any business in the City and County of San Francisco, that she and Harold Adrian came to San Francisco from Reno about one week before the accident, that Adrian had been in her employ about three months in Reno as a musician. That both were living at the St. Francis Hotel at the time of the accident, that at that time he was about 21 years of age, that they had been out together on that evening to visit some friends, that they came back to the St. Francis Hotel at about 20 minutes before the accident. That she (plaintiff in error) instructed him to take the car to the Class A Garage, and that this was all the conversation. His evidence establishes the fact that he told her he was going down on Market street to a publishing house and he would then take the car to the garage.

No instructions were given to him by Mrs. Nixon what particular route to take to go to the garage. There is no evidence before the jury that Adrian drove this Locomobile down to the publishing house; he may have walked down there. It was for the jury to determine from the evidence how much credence was to be given to the evidence of these two witnesses, and how much conversation was had about taking the car to the garage. It appears from the evidence as herein quoted that she selected him as her agent to drive this car, to take it from the garage on the evening of the accident, and to take the car back to the garage; that he had only driven the

car once or twice before the accident. He testified he did not know the exact location of the Class A Garage. (P. 48, Trs.) This being true, he would naturally perhaps take a roundabout way in going there and was on his way to the garage when the accident happened, and he was the agent of plaintiff in error. It is contended by plaintiff in error that Adrian at the time of the accident was not in her employ, but the evidence is uncontradicted that at the time of the accident he was her agent and authorized by her to drive this car owned by her, a big Locomobile touring car, which struck the plaintiff's Studebaker car and caused the injuries of plaintiff, Jennie Shirey. It was for the jury to determine from all of the evidence in the case, and to draw inferences from the evidence as to the facts established by the evidence. The case of *Donaghue* vs. *Hayden,* 208 Pac. 1007, it was contended that Mrs. Hayden was not liable is on all fours with this case. Here it is insisted that plaintiff in error is not liable, but the jury determined that fact against her, likewise the trial court when it denied her motion for a new trial.

In *Newson* vs. *Dierks,* 194 Pac. 520, Court says:

> "Here it may be said that the evidence introduced by the appellant made out a complete defense if full credence was given to it by the trial court, but the court was not bound to unreservedly accept it, even if uncontradicted. The court saw and heard the witnesses testify, and with this advantage, not enjoyed by us, it was for it to determine the degree of credence to be accorded to this testimony. It is not

essential that the credulity of the court should correspond with the positiveness with which a witness testifies.

"A Court may reject positive testimony, although it be not contradicted or impeached by any direct testimony. Its inherent improbability may be such as to deny it all claim to belief. A witness' manner of testifying may give rise to doubts as to his sincerity, or create the impression that the facts testified to by him are colored or not correctly stated," and cases cited.

The jury in this case had a right to determine from the evidence the amount of credence to be given to the testimony of Count Armand d'Aleria and Countess Kate I. d'Aleria. When the case was tried, and long prior thereto, they had intermarried and were then husband and wife. That at the time of the accident that they were sweethearts; that Adrian, as he was then known, was a poor musician and working for wages when so employed, plaintiff in error, the widow of Senator George Nixon, deceased, commonly called Mrs. George Nixon, wealthy and socially prominent. They being husband and wife at the time of the trial, the jury had a right to consider their relation at that time, their interest in the case, and in the outcome of the case, and the reasonableness or unreasonableness of their statements and their evidence as given in the case, and the amount of credence to be given to their testimony; the jury had a right to reject it, or to accept part of it or reject part of it, its weight and effect was for the jury. The plaintiff in error moved for

a new trial, which was denied by the trial court (Page 30, Transcript).

On Motion for a new trial it was held in *Smith Booth Usher Co.* vs. *Detroit Mining Company,* 220 Fed. 601, that

> "If a verdict is rendered contrary to the evidence, the remedy for the losing party is a motion for a new trial. In disposing of that motion, the Court, in the exercise of a sound legal discretion, may interpose and prevent the injustice that may be done by such a verdict." *Insurance Company* vs. *Doster,* 106 U. S. 30-32. "The court may be of opinion that, according to the weight of the testimony, a verdict should be returned for the party asking a peremptory instruction. But it may not, for that reason alone, give such an instruction. It may not take the case from the jury, on issues of fact, unless the evidence is so distinctly all one way that a different view of it would shock the judicial mind." (Page 603.) "The right to a jury trial is guaranteed by the constitution, and it is not to be denied except in a clear case. The foregoing decisions, and many others might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issues, to which the jury may give credit the court is not authorized to instruct the jury to find a verdict in opposition thereto." *Carolina C. Ry Co.* vs. *Strup,* 239 Fed. 79.

In this case the trial court heard and saw the witnesses, and in determining the motion for a new trial weighed the evidence in the case and denied the motion.

The trial court could not weigh the evidence in determining the motion for a directed verdict.

Berger vs. *Payne,* 274 Fed. 787.
Payne vs. *Haubert,* 277 Fed. 648.
Atlantic Ice & Coal Co. vs. *Van,* 276 Fed. 647.
Leahy vs. *Detroit M. & T. Short Line Ry.,* 240 Fed. 86.
Murray vs. *United R. R. of S. F.,* Vol. 33, Cal. App. Dec. 282.

The court on motion for a directed verdict must take the view most favorable to the party not moving

The weight and effect of the evidence is for the jury to determine in arriving at its verdict, and again on motion for a new trial it is for the trial court to weigh the evidence and to determine its weight and effect.

It is held in *Payne* vs. *Haubert,* 277 Fed. 649, that

> "This court has no authority to review and reverse this judgment upon the weight of the evidence." . . . "No exceptions were taken to the charge of the court upon this issue, . . . this assignment of error must be overruled."

It should be noticed that in this case no exception was taken by the plaintiff in error in this case to the charge of the court upon this issue, that is the weight and sufficiency of the evidence, and therefore

this assignment of error as to the sufficiency of the evidence to sustain the verdict and judgment should be overruled when no exception to it was taken by the plaintiff in error in the trial court. There was but one exception taken by the plaintiff in error in the trial court, and that exception as hereinbefore stated was the refusal of the trial court to give to the jury an instruction for a directed verdict. This we contend is the only assignment of error upon which the plaintiff in error can be heard in this case upon her writ of error in this court. It should be noticed that all of the evidence before the jury in this case is not before this court in the Transcript of the Record filed herein.

We respectfully submit to this Honorable Court that the trial judge, Hon. Frank H. Rudkin, did not err in refusing to instruct the jury for a directed verdict in favor of plaintiff in error, and that the verdict and judgment should be affirmed.

W. C. Cavitt,
Attorney for Defendant in Error.

Dated, San Francisco, October 20, 1922.